United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-2099

Submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2099

UNITED STATES OF AMERICA,

Appellee,

—*against*—

WILLIAM ROVENDRO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID G. TRAGER,
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FOR THE SECOND CIRCUIT

Docket No. 75-2099

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM ROVENDRO,

Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Rovendro appeals from an order of the United States District Court for the Eastern District of New York (Hon. Leo F. Rayfiel), entered June 16, 1975, which denied his application pursuant to Title 28, U.S.C. § 2255 to vacate his sentence.

Appellant was convicted, following his plea of guilty, of receipt of a stolen automobile which had been transported in interstate commerce in violation of Title 18, U.S.C. §§ 2313, 2. Judge Rayfiel sentenced appellant on June 15, 1973 to a three year term of imprisonment pursuant to § 4208(a)(2) to run consecutively to State prison terms.

The judgment of the District Court was affirmed by this Court on September 10, 1974.

Appellant then made application for a Writ of Habeas Corpus pursuant to Title 28, U.S.C. § 2255 claiming error on the part of the trial court in refusing permission to withdraw his plea of guilt. The District Court held a hearing and issued an order, entered June 16, 1975, determining that petitioner's plea of guilty was voluntary and that petitioner was adequately represented by counsel.

On this appeal, appellant Rovendro claims that his guilty plea was induced by a false promise of sentence by his counsel. The United States takes the position that the record fails to support appellant's allegations; the plea was voluntarily and knowingly entered and there is no legal justification for vacating the sentence imposed by Judge Rayfiel.

Statement of the Case

I. The Guilty Plea and Sentencing

The appellant, William Rovendro, together with two co-defendants, Christopher Espinosa and William Rowe, was arrested on April 1, 1971 at John F. Kennedy Airport by Port Authority Police. Just prior to the arrest, Rovendro, Espinosa and Rowe were observed to be driving in a stolen 1968 Buick. Petitioner exited from the Buick and approached a 1971 Cadillac, removed the door lock and placed an attache case removed from the Buick into the Cadillac. The case contained a key making machine, 55 blank car keys, a key code and a "slap jack." Rowe drove away in the Cadillac and Rovendro and Espinosa departed in the Buick. All three were apprehended by Port Authority police and charged with possession of burglary tools, unauthorized use of an automobile, criminal possession of stolen property, possession of a key making machine and of a vehicle identification number plate.

William Rovendro was indicted on eight counts by the grand jury, Queens County, for crimes committed at the time of his April 1, 1971, arrest. Among the offenses charged was Criminal Possession of Stolen Property, first degree. He was convicted upon a guilty plea of Criminal Possession of Stolen Property, second degree, on September 30, 1971 and sentenced on January 28, 1972 to a term of one year imprisonment (A. 17-18).

On October 12, 1971, an arrest warant was issued by United States Magistrate Max Schiffman for the arrest of the three men upon a complaint charging violation of Title 18 U.S.C. §§ 2313 and 2, for receiving the stolen 1968 Buick knowing that said vehicle had been stolen and transported in interstate commerce. No federal charges were lodged for the theft of the 1971 Cadillac.

Appellant Rovendro was arrested by FBI agents on October 13, 1971. The grand jury indicted him on November 9, 1971 (71 Cr. 1147) and he was arraign d on December 2, 1971.

On the date set for trial, April 17, 1972, appellant, through his counsel, Martin Light, Esq., orally moved the District Court (Rayfiel, *J.*) for dismissal of the indictment on the ground that he had been convicted in New York Supreme Court, Queens County for the "identical charge" involved in the federal indictment (Transcript of April 17, 1972 at 3-4; A. 8-9). The Court did not reach the merits of what was essentially a claim of double jeopardy, but instructed counsel to make a written motion and submit a memorandum of law. The Assistant United States Attorney stated that it was not the same crime since the federal indictment charged defendant with interstate transportation of a stolen vehicle (Transcript of April 17, 1972 at 6; A. 11). The trial was adjourned until April 2, 1973. Defense counsel never complied with the court's direction to file a motion and memorandum

of law so that the court might hear argument on the double jeopardy issue.

On April 2, 1973, Rovendro (represented by Marvin Preminger, Mr. Light's partner) and his co-defendants pleaded guilty to violation of 18 U.S.C. §§ 2313 and 2. The court fully complied with Rule 11 of the Federal Rules of Criminal Procedure in accepting the pleas.

At the sentencing proceedings on June 15, 1973, Mr. Light, representing Rovendro and Espinosa, made application to the Court to withdraw his clients' guilty pleas (Transcript of June 15, 1973 at 3; A. 67). The reason given by Mr. Light was that his clients felt "pressured into pleading guilty because they were not able to get a speedy trial . . ." (*Id.*) Mr. Light also alluded in general terms to "certain conversations that there was a possibility that the [federal] indictment would be dismissed because they already pleaded technically to the same case, even though they are different charges." (Id., at 4; A. 68). He acknowledged that he was informed that "they" (presumably the Assistant U.S. Attorney's superiors) "didn't want to dismiss." (*Id.* at 6; A. 70). Mr. Light also raised the drug addiction of defendants as a factor to be considered in sentencing and in the government's ability to prove that defendants knowingly possessed a car transported from New Jersey. When Judge Rayfiel inquired, "Why wasn't something said about this when they entered their pleas of guilty?" Mr. Light responded: "I was not there. Mr. Preminger took the pleas." (Id. at 7, 16; A. 71, 80). Judge Rayfiel refused to permit the defendants to withdraw their guilty pleas.

Thus, at the sentencing, Rovendro's counsel raised the issues of criminal responsibility, and "double punishment" (*Id.* at 14-15; A. 78-79), and suggested that the government had considered dismissing the charges against Rovendro and his co-defendants. In the extended discus-

sion between the Court and Mr. Light of these matters, the Court gave careful consideration to all the factors before imposing a sentence of three years on Rovendro and his co-defendant to run consecutively to their State sentences (*Id.*, at 22-23; A. 86-87).

II. Direct Appeal to the Court of Appeals

Defendants Rovendro and Espinosa appealed from the judgments of the United States District Court (Rayfiel, *J.*). Mr. Martin Light was assigned as their counsel. In his brief, Mr. Light again referred to his clients' impression that their indictment might be dismissed but admitted that he was advised by the Assistant U.S. Attorney that the government did not intend to dismiss (Appellant's Brief at 6).

The appellants' brief purported to focus on only one point: The District Court erred in denying defendants' motion to withdraw their guilty pleas because the State conviction barred any federal prosecution (*Id.* at 7; A. 106). Despite this statement of the issue raised on appeal, Mr. Light proceeded to argue that Judge Rayfiel had not complied with Rule 11 in accepting the guilty pleas of Rovendro and his co-defendants. The argument then proceeded to assertions that the Government could not have proved defendants' knowledge that the vehicle in question was transported from New Jersey and that only a State crime was involved. (Appellant's Brief at 8-9; A. 107-08). The argument culminated with the conclusion that since "appellants were given and served one year sentences in the State court for the very same acts, that the acceptance of that plea and an imposition of a three year sentence in the Court below is a sufficient injustice that requires a reversal." (Appellants' Brief at 10; A. 109).

Viewing the brief as a whole, for its content rather than its format, we interpret it as putting in issue on appeal, the question of double jeopardy, and inadequate observance by the Court of procedural safeguards in accepting a guilty plea.

The government in its brief (A. 99-100), reviewed the colloquy at sentencing. The record convincingly established that the Court complied in full with the requirements of Rule 11 and that there was no abuse of discretion in refusing to permit the withdrawal of the guilty pleas (*Id.* at 102-03). Secondly, both on the law and the facts, the United States demonstrated that appellants' claim of double jeopardy was without merit. A prior State conviction does not preclude federal prosecution for the same criminal acts (*Id.* at 104), *Abbate* v. *United States*, 359 U.S. 187, 189-90 (1959); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922); *United States* v. *Barone*, 467 F.2d 247, 250 (2d Cir. 1972).

On September 10, 1974, this Court affirmed the convictions of Rovendro and Espinosa for violation of Title 18 U.S.C. §§ 2312 and 2 (A. 110-11).

III. Appellant Rovendro's Petition for Writ of Habeas Corpus

Following this Court's affirmance of the District Court judgment of conviction, Rovendro petitioned for a writ of habeas corpus under Title 28 U.S.C. § 2255. He also requested appointment of counsel and permission to proceed in forma pauperis. Judge Rayfiel appointed Martin Elefant, Esq. on February 10, 1975 as counsel for the petitioner-appellant.

Petitioner alleged that at the time he was arrested for possession of a stolen vehicle he was not given his "Constitutional Rights" under *Miranda* (Appellant's Ap-

pendix at 2B). He stated that he pleaded guilty in State court solely "because of a plea bargain guaranteeing a sentence of no more than one year" (*Id.* at 3B).

At the time of his guilty plea, petitioner was represented by Mr. Preminger, who, according to petitioner, "had no knowledge whatsoever of his case, nor of a plea bargain which had been consummated between the petitioner's appointed counsel Mr. Marvin Light and U.S. Attorney Mr. Favorito, whereby this petitioner was to have received a concurrent sentence . . ." (Appellant's Appendix at 4B.)

Petitioner then referred the Court to many pages of the plea minutes and asserted that the minutes demonstrated that petitioner was denied adequate counsel and a fair hearing, and subjected to conflict of interest, double jeopardy and a "prejudiced judge" who based his decision on a "false and incomplete pre-sentence report." (*Id.* at 5B-6B). Petitioner concluded that his guilty plea was coerced and the District Court erred in not permitting him to withdraw the plea at the sentencing proceeding on June 15, 1973. Accordingly, petitioner asked that his federal sentence be vacated.

A hearing on petitioner's application for relief under Title 28, U.S.C. § 2255 was held before Judge Rayfiel on June 10, 1975. Rovendro testified that his former counsel, Mr. Light, informed him that the United States Attorney said "the case was no good, it was a meatball case, they just wanted a conviction, take a plea and I'd get a concurrent sentence." (Transcript of June 10, 1975 at 11; A. 129). Rovendro stated that only he and Mr. Light knew of this "arrangement" with the U.S. Attorney (*Id.*, at 12; A. 130).

Mr. Light, Mr. Preminger and Mr. Favorito, the Assistant U.S. Attorney then handling the case, denied

that any arrangement promising a dismissal or concurrent sentence was ever made (*Id.* at 46, 60, 62, 70-79; A. 151, 161, 163, 167-69). Mr. Light characterized the matter as his "feeling" that Judge Rayfiel would impose a concurrent sentence (*Id.* at 60, 63-65, 69-70; A. 161, 164-66).

At the same habeas corpus hearing of June 10, 1975 the subject of adequacy of counsel and prior references to double jeopardy were also raised. Rovendro stated that he was satisfied with the representation by Mr. Light and his partner Mr. Preminger except for the proceeding on April 2, 1973 in which he pleaded guilty to the federal charge (*Id.* at 28-29; A. 141-42). He was dissatisfied on that occasion because Mr. Preminger had appeared (Mr. Light was otherwise engaged) and "Mr. Preminger wasn't familiar with the case." (*Id.* at 29; A. 142). Mr. Preminger testified that Mr. Light gave him an outline of the case and he was aware of the legal questions involved (*Id.* at 43; A. 148). Thus, Rovendro did not find fault with Mr. Light's representation except for Mr. Light's absence from court when Rovendro pleaded guilty (*Id.* at 29; A. 142). Rovendro admitted he never intended to go to trial (*Id.* at 31; A). He pleaded guilty, he maintained, because of a "promised" favorable disposition, at the same time as he assured Judge Rayfiel that no promises had been made to him by his lawyer (*Id.* at 31; A. 144).[1]

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[1] Rovendro explained this contradiction by observing:

> I never been in Federal Court before. I been in State Courts many times. And over there when you make a deal you make it with the District Attorney and every time they ask you, "Have you been promised," you, as always say no. It's a formality. I never been in the Federal Court. The State Court, it's a formality. "Have you ever been promised something?" You say, no (*Id.* at 32; A. 145).

After the plenary hearing, Judge Rayfiel denied the application for a writ of habeus corpus on June 16, 197 (Appellant's Appendix 1C-3C). In his order, Judge Rayfiel stated:

> It is clear that petitioner was adequately represented by counsel who appeared for him in defense of the indictment and conducted petitioner's appeal from this court's denial of his application for leave to withdraw his plea of guilty. It is likewise clear, from the evidence, that petitioner's plea of guilty was not induced by any promises made by any attorney in the case, and that the plea was entirely voluntary. There was no claim of any promise of inducement by the court. Petitioner was also adequately represented by counsel, assigned to him in this proceeding . . . (*Id.* at 2C).

As to the other charges raised by petitioner, Judge Rayfiel found that no evidence or insufficient evidence was offered to support them. Thus, the district court considered all grounds for relief advanced by petitioner and denied the petition in its entirety.

IV. Appeal from Denial of Writ of Habeas Corpus

In this collateral attack upon the sentence imposed by the District Court, appellant now concentrates upon one contention—that Rovendro's plea of guilty "was induced by a false promise of sentence by his court assigned counsel" (Appellant's Brief at 4) (see discussion *supra*, Statement of the Case, Part III). He argues that the Court must implement the promise by resentencing him to a three year concurrent term. The reasons which compel this result are the deception of appellant and, tangentially, lack of counsel's dedication to his defense. In sum, appellant again contends that his plea of guilty was not voluntarily and knowingly made and consequently the conviction and sentence founded on such a plea are inconsistent with due process.

It is the position of the United States that: it is not the Court's function to enforce a promise, if indeed one was made, by counsel to his client; the District Court's findings that Rovendro's plea was "entirely voluntary" and that he was "adequately represented by counsel" at all proceedings involved in this case are amply supported by the record and should be affirmed.

ARGUMENT

POINT I

The appellant's guilty plea was voluntary and he was adequately represented by counsel; hence there is no ground on which his sentence should be vacated.

Of the many issues which have been raised in this case, both on direct and collateral attack, we believe that those argued by appellant on his direct appeal [1] are concluded by this Court's affirmance of September 10, 1975. Thus, while the doctrine of res judicata may lack its full impact in § 2255 proceedings, nonetheless,

> where the trial or appellate court has had a "say" on a federal prisoner's claim, it may be open to the § 2255 court to determine that on the basis of the motion, files, and records, "the prisoner is entitled to no relief." See *Thornton* v. *United States*, 125 U.S. App. D.C. 114, 125, 368 F.2d 822, 833 (1966) (dissenting opinion of Wright, *J.*).
>
> Furthermore, the § 2255 court may in a proper case deny relief to a federal prisoner who has de-

[1] The double jeopardy claim and alleged failure of the Court to comply with Rule 11.

> liberately bypassed the orderly federal procedures provided at or before trial and by way of appeal—*e.g.*, motion to suppress under Fed. Rule Crim. Proc. 41(e) or appeal under Fed. Rule App. Proc. 4(b). *Fay* v. *Noia*, *supra*, n. 3, at 438; *Henry* v. *Mississippi*, *supra*, n. 3, at 451-452.[2]

Arguably, the issues pressed by appellant on this appeal may be viewed as precluded since neither the trial nor appellate court would have found the guilty plea viable if it had been proven to be the product of false inducement as appellant now claims. Appellant Rovendro's contention that his attorney at the time of the original proceedings, Martin Light, had promised him a concurrent sentence was flatly contradicted by Mr. Light, his partner, Mr. Preminger, and the Assistant United States Attorney, Mr. Favorito. Therefore, if Judge Rayfiel's finding, following the evidentiary hearing of the § 2255 petition, that the plea was "entirely voluntary" is tested by the applicable standard of review, Federal Rules of Civil Procedure Rule 52(a), the appellate court would encounter great difficulty in holding that the district court's determination was "clearly erroneous." *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092, 1097-98 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States ex rel. Carter* v. *LaVallee*, 441 F.2d 620, 622 (2d Cir. 1971); *Zovluck* v. *United States*, 448 F.2d 339, 341 (2d Cir. 1971).

All that the record reveals is that Mr. Light expressed a hope or a feeling that appellant would receive a con-

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[2] *Kaufman* v. *United States*, 394 U.S. 217, 227, n. 8 (1969). See also *Genovese* v. *United States*, 378 F.2d 748, 750 (2d Cir. 1967); *Dirring* v. *United States*, 370 F.2d 862, 864 (1st Cir. 1967).

current sentence. Judge Clark for this Circuit commented in a similar factual context:

> If on so flimsy a basis as this, amounting . . . to no more than counsel's hope for a suspended sentence, a plea of guilt may be withdrawn, it is obvious that an accused may safely indulge in a plea of guilt as a mere trial balloon to test the attitude of the trial judge being reasonably secure in the knowledge that he can withdraw it without great difficulty. *United States* v. *Weese*, 145 F.2d 135, 136 (2d Cir. 1944).

Similarly, Judge Hays concluded: "An erroneous sentence estimate by defense counsel does not render a plea involuntary." *United States ex rel. Bullock* v. *Warden*, 408 F.2d 1326, 1330 (2d Cir. 1969). As Judge Mansfield expressed it, ". . . the erroneous belief, induced by discussions with his lawyer, that he [petitioner] would receive a lesser sentence than that ultimately imposed . . . has repeatedly been held insufficient to warrant the issuance of a writ." *United States ex rel. Curtis* v. *Zelker*, *supra*, 466 F.2d at 1098; *Accord*, *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 108 (2d Cir. 1970); *United States* v. *Lombardozzi*, 436 F.2d 878, 880 (2d Cir. 1971). A plea is not involuntary and may not be withdrawn on the subjective ground that a defendant *believes* he was promised leniency. *United States ex rel. LaFay* v. *Fritz*, 455 F.2d 297, 301 (2d Cir. 1972); *Mosher* v. *LaVallee*, 491 F.2d 1346, 1347 (2d Cir. 1974).

As an alternative to withdrawing his guilty plea, appellant asks the court for specific performance of the alleged promise of his attorney. This Court has recently declined to be cast in the role of automatically enforcing purported plea arrangements. Judge Hays observed in *United States ex rel. Selikof* v. *Commissioner of Correction of the State of New York*, at 237 (slip op. 218, October 21, 1975):

> The defendant seeks to impose principles of contract upon the plea bargaining process. Such principles, borrowed from the commercial world, are inapposite to the ends of criminal justice. High among those ends are the protection of the public from criminal behavior and the protection of the criminal defendant from indiscriminate punishment.
>
> Justice would be disserved by forcing the State to fulfill Selikoff's expectations by blind application of the contractual remedy of specific performance to plea bargaining.

The guilty plea in this case was not only uncoerced and voluntary but also knowingly entered. As counsel asserted in his brief, appellant was "a man very familiar with criminal court proceedings" and ""knew the standard answers to give to standard questions" (Appellant's Brief at 5, 7). A defendant who intentionally responds falsely when the trial judge inquires into promises regarding his plea cannot expect that the court will subsequently permit him to withdraw his plea when he discloses a private understanding. The judicial process may not "be frustrated by secret agreements between the defendant and his counsel." *United States* v. *Rich*, 516 F.2d 861, 86 (2d Cir. 1975).

Finally, as to Rovendro's residual claim that he was not afforded "effective assistance of counsel" (Appellant's Brief at 6), his only criticisms of Mr. Light's representation are that he did not see his client for one year, sent his partner to court as a substitute on one occasion and never made a written motion in the case. These are threadbare allegations and cannot, even with extravagant magnification, meet the standard adopted by the courts for reviewing a claim of inadequacy of counsel. The purported shortcomings cannot qualify as conduct which

would "shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States ex rel. Curtis* v. *Zelker, supra*, 466 F.2d at 1101; *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971).

CONCLUSION

The order appealed from should be affirmed.

Dated: October 30, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOSEPHINE Y. KING,
Assistant United States Attorney,
of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

PAUL F. CORCORAN being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 31st day of October 19 75 he served ~~a copy~~ two copies of the within

Brief for the United States of America

by placing the same in a properly postpaid franked envelope addressed to:

Martin Elefant, Esq.
16 Court Street
Brooklyn, N. Y. 11241

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Paul F. Corcoran
PAUL F. CORCORAN

Sworn to before me this

3rd day of November 19 75

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977